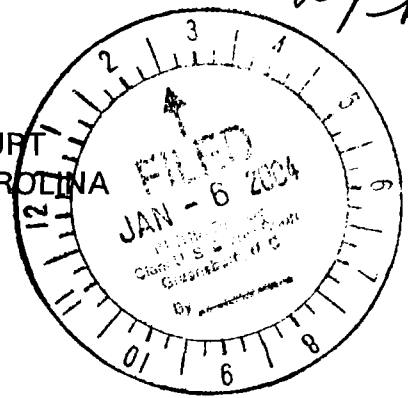


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18. *klm*

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



PATRICIA Y. ROGERS and  
BUDDY H. ROGERS,

Plaintiffs,

v.

SOVEREIGN BANK FOUNDATION;  
SPARTAN MORTGAGE, INC.;  
FANNIE MAE FOUNDATION;  
ROBERT WHITTINGTON; and  
H. TERRY HUTCHENS, P.A.,

Defendants.

1:03CV00262

MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is before the Court on Defendant Sovereign Bank Foundation's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and, alternatively, for failure to state a claim pursuant to Rule 12(b)(6) [Doc. #9]. . For the reasons set forth below, the Defendants' Motion will be GRANTED.

I.

The allegations of the Complaint, in the light most favorable to the Plaintiffs, are as follows: Plaintiffs Patricia and Buddy Rogers first made contact with the Defendants when seeking to refinance the mortgage on their home. The Rogers contacted Robert Whittington, an agent of Spartan Mortgage, Inc., in July of 2001.

The Rogers told Mr. Whittington that they were living on a fixed income and could not afford a monthly payment any greater than their current payment of \$1,175. Mr. Whittington assured the Rogers that he could obtain a loan with monthly payments less than \$1,175.

Mr. Whittington arranged a refinancing package, and instructed the Rogers to meet him on January 17, 2001 to sign the paperwork. When the Rogers arrived at the meeting, they learned that the monthly payments under the refinancing would be \$1,456, an amount greater than both their current loan payment and their total monthly income. Further, a Truth-in-Lending disclosure from the lending bank, Sovereign Bank,<sup>1</sup> indicated that the total payments under the loan would be \$462,688.33. However, the terms of the payment schedule on the note indicated that total payments would equal \$463, 373.42. When Mrs. Rogers protested, Mr. Whittington assured her that he would refinance the loan again at an even better rate within six months. Eventually the Rogers agreed to sign the promissory note.

The Rogers had difficulty meeting the new monthly loan payments and, in June of 2001, Mrs. Rogers began contacting Mr. Whittington about the refinancing he had promised. She informed Mr. Whittington that she and her husband had already begun drawing on their pension to meet the payments. In the meantime, Mrs. Rogers contacted the Fannie Mae Foundation and Sovereign Bank numerous

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<sup>1</sup>As will be discussed infra, Sovereign Bank is a separate entity from the named Defendant Sovereign Bank Foundation.

times about refinancing options, only to learn that neither organization could help. As of the end of July 2001, Mr. Whittington had not provided any refinancing options and had instead instructed Mrs. Rogers not to call him again. He informed Mrs. Rogers that his job was to write loans for Sovereign Bank, not to help her. Mrs. Rogers fell ill and the Rogers fell behind on their payments. Foreclosure proceedings began on December 5, 2001.

The Rogers filed this action in Superior Court of Randolph County to enjoin the foreclosure action, alleging fraud, negligent misrepresentation, unfair and deceptive trade practices, usury and breach of fiduciary duty. They also assert claims under the Truth in Lending Act, 15 U.S.C. § 1601-1693.

The suit was brought by issuance of summons on January 15, 2003, and the Complaint was timely filed within the twenty days allotted by state law. While the Order for Commencement of Action by Summons named Sovereign Bank as one of the Defendants, and was properly mailed to Sovereign Bank, the Complaint was erroneously sent to Sovereign Bank Foundation ("SBF") at the same service address. SBF removed the action, asserting federal question jurisdiction under 28 U.S.C. § 1331.<sup>2</sup> SBF then filed a Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, SBF alleges that it is not the proper Defendant, and that the Rogers have no standing to sue SBF.

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<sup>2</sup>The caption of the removed suit has been changed to include Sovereign Bank Foundation instead of Sovereign Bank.

## II.

The Rogers admit that they did not have standing<sup>3</sup> to bring suit against SBF and that they did not intend to do so. SBF is a charitable organization which makes contributions to non-profit organizations. SBF does not originate, hold, or process loans or notes, and it does not receive any fees in connection with such loans. SBF did not make any representations to the Rogers, nor did it have any responsibilities under state or federal law as a creditor. Accordingly, SBF's Motion to Dismiss will be GRANTED.

The parties, while conceding that SBF is not a proper Defendant, have given a great deal of attention in their briefs to the issue of amending the Complaint to name the proper Defendant. SBF, while emphasizing that it is not a parent or subsidiary of Sovereign Bank, wants to ensure that Sovereign Bank is not named in this suit. Specifically, SBF has urged this Court to grant its Motion to Dismiss without leave to amend, arguing that suit against the proper Defendant bank would also be futile because the Rogers have failed to allege facts sufficient to state a claim against the lending bank. However, because SBF has no interest in this action, this Court will not add that condition to this order. The Rogers are free to file a Motion to Amend should they choose to do so, and the Court will consider that motion if and when it is filed.

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<sup>3</sup>The three requirements for standing are: (1) injury in fact, (2) traceability of the injury to the Defendant, and (3) redressability of the injury by the Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

III.

For the reasons stated above, the Defendant's Motion to Dismiss will be  
GRANTED.

This the 16 day of January, 2004.

  
United States District Judge